S. 782, 91st C.

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

July 1, 1970

Honorable David N. Henderson
Chairman, Subcommittee on Manpower
and Civil Service
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

This is in response to your request to submit the views of the Civil Service Commission on S. 782 which passed the Senate on May 19, 1970.

S. 782 is a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy". While the Commission agrees fully with the purpose of S. 782 as expressed in its title, the bill has provisions which would adversely affect the effective operation of the executive branch and to which we strongly object. This report discusses the two major faults in the proposed legislation. Other provisions of the bill which we feel need clarification or improvement are discussed in the appendix to this report.

The two major faults in the bill are the provisions that would (1) establish a new executive agency, "The Board on Employees' Rights" (referred to herein as the "Board") and (2) allow summary recourse to the Federal courts without the exhaustion of any administrative remedy.

Establishment of the Board

The establishment of the Board would be a retrogressive step not in keeping with present-day efforts to maintain a positive, cooperative atmosphere in the area of employee-management relations. Management in the Federal service is trained to deal fairly and cooperatively with employees and labor organizations. The creation of a separate agency for the exclusive purpose of hearing a limited number of employee grievances, with authority to direct disciplinary action against managers and supervisors, would change the present cooperative atmosphere to a litigious one. We believe the existence of the Board would emphasize adversary attitudes which is a negative approach totally at odds with the present positive policy of seeking employee-management cooperation.

The creation of the Board would result in a distortion of the programmatic needs of the Government by splintering off, for consideration in a separate agency, a small assortment of grievances. The matters referred to in section 1 of S. 782, while they are by no means not of consequence, are certainly of no greater consequence than the many other personnel aspects not touched by the bill. For example, the Board would not consider complaints of racial or religious discrimination, improper consideration of candidates for appointment, training, or promotion, and determinations relating to pay and leave. We find it particularly incongruous to establish a separate executive agency to determine whether a supervisor intimated that notice would be taken of the attendance of employees at a meeting on a non-job related subject, such as donating blood, whereas the regular, presently-established administrative process is considered adequate to decide such serious matters as whether an employee's removal from the service on a grave charge, such as criminal conduct, is procedurally valid and justified on the merits.

The grievance-type matters referred to in section 1 of the bill are not deserving of special treatment by a separate agency but should, like any other grievance or appeal, be handled under existing procedures in the agencies and the Civil Service Commission. Under the present system the Civil Service Commission operates as the central personnel agency dealing with all aspects of personnel management. We submit that it should continue to do so as this type of centralization is the only effective means of achieving consistency in total personnel administration.

Each executive agency has procedures for handling employee grievances which are required to conform with the standards set out in Subchapter 1 of chapter 771 of the Federal Personnel Manual. Moreover, today agencies and labor organizations have in many instances cooperatively worked out grievance procedures that would, in the areas covered by section 1 of the bill, be negated by the establishment of the Board. We are convinced that the establishment of the Board, with its attendant expensive procedures, will nullify the effectiveness of the grievance procedures produced under the present program.

Existing grievance and appellate procedures are fully effective to assure employees of the fair settlement of complaints of the type referred to in the bill. It is surely reasonable that agencies, as is the case under the present grievance and appellate processes, should be given the initial opportunity to settle internal personnel disputes before such matters are taken to an outside authority as would be the case if the Board were established.

The authority that would be given the Board to discipline an officer or employee of any agency in the executive branch would alter the general rule that the power to discipline is vested in the appointing authority. The placement of that authority in the Board would also create a conflict

with authorities vested in the Civil Service Commission by statute and Executive order to decide appeals within the executive branch with respect to disciplinary matters.

Summary Judicial Intervention

Section 4 of S. 782 would permit an employee or applicant for employment to sue a Federal officer or employee, in his individual capacity, when he is believed to have violated the prohibitions in the bill. Moreover, the lawsuit could be brought without exhausting any administrative remedy and without regard to the existence or amount of pecuniary injury.

It is a fundamental principle of sound judicial administration that an individual is not entitled to judicial relief until any existing administrative remedies have been exhausted. The proposal in section 4 is such a complete departure from the customary requirements for legal review that we are hard put to understand its intended objective. We are, however, certain that its result will not only place an uncalled for additional work load on our already overburdened judiciary, but will adversely affect the operation of the Government. A provision such as this, which is an invitation to sue for an imagined wrong without attempting an administrative settlement, could readily be used as a means of harassment against Government managers by vindictive individuals both within and outside of Government. Individuals who sincerely believe they have a valid complaint should certainly not object to a timely administrative review before seeking settlement by a court or other outside authority.

As the Civil Service Commission recognized that the provisions of section 4 allowing direct access to the courts would have an impact on the judicial branch we requested the Judicial Conference of the United States to consider that facet of S. 782. On page 60 of the report of the proceedings of the Judicial Conference issued on December 18, 1969, by Chief Justice Warren E. Burger, the Conference expressed its disapproval of section 4 as follows:

> "* * *Section 4 * * * would give the employee the right to go directly into the federal courts. Inasmuch as section 5 of the bill provides for the utilization of the administrative process by the aggrieved employee, the Conference disapproved Section 4 as being inconsistent with the provisions of Section 5."

We note also in this regard that the Deputy Attorney General in his report to the Chairman of the House Committee on Post Office and Civil Service on H.R. 1197, a bill containing a provision identical to section 4 of S. 782, had the following to say regarding the provision:

> "* * *In particular the Department objects to the provision of the bill allowing an employee who claimed that his rights had been invaded to resort to the Federal courts without having first exhausted his administrative remedies -- even the administrative remedy created by the bill.* * *"

Government officials are normally immune from personal liability for their official actions by reason of the doctrine that the "effective functioning of government" makes it essential that they "be free to exercise their duties unembarrassed by the fear of damage suits" against them as individuals (Barr v. Mateo, 360 U.S. 564 (1959)). The direct recourse to the courts which would result from section 4 would alter this doctrine and hamper the active and effective administration of the Government by opening its officials to the threat of personal lawsuits.

Conclusion

Our study of S. 782 has convinced us that the proposed legislation is unbalanced to such an extent that if legislation of this type is needed at all, the bill at hand requires extensive revision. We in the Civil Service Commission are as concerned as anyone, and more concerned than most, over the protection of employee rights (constitutional and otherwise). But we are equally concerned that the attempts to protect employee rights are not allowed to overshadow the fact that employees also have obligations to the Government and that the proper conduct of the public business is a paramount consideration when the rights and obligations of employees are under consideration. S. 782 is wholly devoted to employee rights, indeed to a very narrow group of employee rights. It overlooks completely the existence of employee obligations and the fact that exclusive attention to the protection of some rights, without consideration of related obligations and Governmental operational needs, may seriously disrupt the functions of government.

The Civil Service Commission submits that there is ample authority within the executive branch to correct any abuses of the type referred to in S. 782. The enactment of this bill will not end abuses of the type it covers, indeed the corrective-action provisions of the bill recognize that violations will continue. Our concern is that S. 782 is an unneeded and inappropriate means of coping with the complaints that prompted its introduction. Because of this, the Civil Service Commission is strongly opposed to the enactment of S. 782 as long as it contains provisions that establish an independent agency such as the Board on Employees' Rights and that provide direct access to the courts without any exhaustion of administrative remedies.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of S. 702 in its present form would not be consistent with the Administration's objectives.

By direction of the Commission:

Sincerely yours,

S/Robert E. Hampton

Chairman

APPENDIX

This appendix to the report of the Civil Service Commission on S. 782 supplements that report by supplying what we consider are necessary modifications of those sections of the bill which the Commission could endorse if they were a part of a bill that did not include the highly objectionable provisions of the type discussed in the report.

For convenience the appendix has been prepared in a section-by-section arrangement with references to S. 782 and amendments explained by page and line of the bill.

§ 1(a) would prohibit requesting an employee or applicant to disclose his race, religion, or national origin. There are times when there is a real need to request the disclosure of such information, i.e., to resolve a complaint of discrimination. We emphasize that this information would never be demanded or required--only requested on a voluntary basis. Because of this proper need, on page 2, line 18, we suggest that the period after "States" be changed to a colon and the following proviso be added, "Provided further, That nothing contained in this subsection shall be construed to prohibit a request for information concerning race, religion, or national origin of such employee or person when that matter is in issue in an allegation or complaint of discrimination." In addition, on line 10 of page 2, the word "statutory" should be deleted as the Commission has regulatory prohibitions against the employment of non-citizens which can be properly enforced only if citizenship inquiries are permitted.

§ 1(b) would prohibit intimating to an employee that notice will be taken of his attendance at a meeting which is not related to his official duties. The language used in this subsection has been sufficiently clarified by the legislative history so that the Commission is able to accept it without amendment. (S. Rept. No. 91-873, 91st Cong., 2d Sess. 38 (1970).)

§ 1(c) would prohibit requests that employees participate in activities that are not related to official duties. We have but one problem with this subsection which is that it could be interpreted so as to interfere with certain worthwhile activities such as the blood donor program. We suggest that on page 3, line 20, the period after "duties" be changed to a colon and the following proviso added, "Provided, however, That nothing contained in this subsection shall be construed to prohibit the use of appropriate publicity to inform employees of requests for assistance to public service programs or organizations."

§ 1(d) would prohibit requesting reports from employees on their outside activities unless the reports are related to official duties or when there is reason to believe a conflict-of-interest situation exists. We consider it essential for Federal managers to be able to make inquiries in areas relating to national security and employee safety. These inquiries may necessitate reports on activities not directly related to

an employee's official duties. So that these entirely reasonable types of inquiries may be made, the subsection should be amended by striking the language in the subsection after the comma on line 6 of page 4 and in lieu thereof inserting "or a report is necessary to assure the efficient and safe performance of the work of the department or agency, or for law enforcement purposes, or when the position of an employee is one that requires such a report in the interest of national security or in order to prevent outside activities or employment that would be in conflict with official duties."

§ 1(e) would prohibit the interrogation of an employee or applicant in regard to information concerning his personal relationship with a relative, his religious beliefs, or his sex attitudes. There is a proviso which would allow interrogation when a specific charge of sexual misconduct has been made. We do not construe the language regarding inquiries concerning a person's "personal relationship" with a relative as prohibiting inquiries needed to settle antinepotism cases under 5 U.S.C. 3110. The latter statute requires relationship inquiries (as distinguished from "personal" relationship inquiries) for proper enforcement. Accordingly, the Commission can accept subsection (e) without amendment.

§ 1(f) would prohibit requests to an employee or applicant to take a polygraph test relative to his personal relationship with relatives, his religious beliefs, or his sexual attitudes. The Civil Service Commission has prohibited the use of the polygraph for employment screening for positions in the competitive service except for agencies having a highly sensitive intelligence or counter-intelligence mission directly affecting national security and then only under the strict controls set forth in the Federal Personnel Manual, pages 736-D-1, 736-D-2 (copies attached). While subsection (f) would further narrow the use of the polygraph for a few agencies (the Civil Service Commission itself does not use it at all), we consider that the limited scope of subsection (f), and the exclusions of the intelligence-type agencies in sections 6 through 9 of S. 782 make subsection (f) not objectionable. In this regard we urge the Subcommittee to adopt the suggestions of the Department of State and the Department of Defense on S. 782 in order to further assure that the bill does not adversely affect the proper security interests of the Government.

§ 1(g) would prohibit requesting an employee to support by personal endeavor, or by the contribution of money or any thing of value, the nomination or election of a person or group to public office in the Federal or in a State or local government, or a request to an employee to attend a meeting to support a political party. We are of the opinion that this provision is out of place in S. 782 and rightfully belongs in legislation which relates to political activities generally, such as H.R. 2372, 91st Cong., 1st Sess. However, if this subsection is left in S. 782, aside from the duplicative nature of it when considered with

other legislation, such as subchapter III of chapter 73 of title 5, United States Code, we have no objection to the intended purpose of the provision or to the language used.

§ 1(h) expresses the present policy of the executive branch against the use of coercion in Government bond and charity drives. Accordingly, we have no objection to the subsection but suggest that for the sake of clarity the word "subsection" on line 12 of page 6 be changed to "section" so that neither subsection (c) or (d) is interpreted as negating the proviso in subsection (h).

§ 1(i) would prohibit requests that employees make financial disclosures except in limited circumstances (e.g., when the employee has final tax determination authority) which are further limited by § 1(k) to specific financial items "tending to indicate a conflict of interest". These two subsections, operating together, would destroy much of the present ethical conduct program within the executive branch. The provisions are unduly restricted in coverage in that they omit the inclusion of Presidential appointees and employees in several significant potential conflicts areas, such as grant administration, the regulation of private enterprise, and procurement. Furthermore, subsection (j) seems to be applicable only when a conflict of interest appears to exist, as distinguished from the present executive branch program which is aimed at preventing conflict situations from arising. These weaknesses can readily be corrected by inserting the words "Presidential appointee or any" on line 3 of page 7, after the word "any"; by inserting the words "a Government contract, grant, or the regulation of non-Federal enterprise, or with respect to" on line 5 of page 7, after the word "to"; and by changing the word "tending" on line 22 of page 7 to "which may tend".

§ 1(k) would not allow any questioning of an employee under investigation for misconduct which could lead to disciplinary action without the presence of counsel when requested. The present regulations of the Civil Service Commission and executive branch agencies assure employees of the right of counsel in disciplinary proceedings but not when ordinary day-to-day inquiries are necessary to allow normal supervisory operations. For example, under subsection (k) as presently drafted an employee thought to have been smoking in a restricted area could demand representation by counsel before answefing a supervisor's query as to whether or not he had been smoking. This unwarranted, and we assume unintended, restriction can be ended by changing the period after "involved" on line 12 of page 8 to a colon and adding the following proviso, "Provided, further, however, That the right of representation under this subsection shall not extend to informal discussions concerning job-related subjects such as work performance, attendance, and relations with other employees."

§ 1(l) would prohibit disciplinary and other retaliatory actions against an employee because of his refusal to comply with a request or submit to an action made unlawful by the bill. The Commission has no objection to this provision.

§ 2 makes applicable to the Civil Service Commission the various prohibitions set forth in section 1 which are applicable between the departments and agencies and the employees in, and applicants for positions in, those departments and agencies. The Commission has no objection to this section provided the other amendments suggested herein are made.

§ 3 makes applicable to commissioned officers of the armed forces, and to members of the armed forces acting under an officer's authority, the various prohibitions set forth in section 1. We do not object to this section.

§§ 4 and 5 are, as indicated in the body of our report, completely unacceptable to the Civil Service Commission. There are several alternatives to these sections that would not be objectionable. One would be to delete these sections and let the bill operate within the present executive branch grievance and appellate systems. In other words, the various actions made unlawful by section 1 of the bill would constitute valid bases for a grievance or an appeal under existing procedures. Another would be to create a statutory board within the Civil Service Commission to resolve all grievances, including those referred to in section 1 of S. 782. Also the Commission would not oppose a provision giving access to the courts if it first required the exhaustion of any available administrative remedy and if the defendant is the Government rather than an official of the Government. The Commission's staff will be glad to cooperate in preparing whatever type of legislation the Subcommittee considers appropriate in lieu of sections 4 and 5.

§§ 6, 7, 8, and 9 provide exceptions from all or portions of S. 782 for the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency. The Commission has no objection to these sections. We do, however, urge that the Subcommittee give careful consideration to the additional exceptions needed in the interests of national security which are referred to in the reports on S. 782 submitted by the Department of State and the Department of Defense.

§ 10 is covered by the objections we have made to sections 4 and 5. Section 10 merely states that an agency may have a grievance procedure to enforce the bill, but that an employee need not use that procedure if he prefers to go directly to court or to the Board on Employees' Rights.

§ 11 is the usual separability provision to which we have no objection.

Appendix D. Use of the Polygraph in Personnel Investigations of Competitive Service Applicants and Appointees to Competitive Service Positions

D–1. AGENCIES WHICH MAY USE THE POLYGRAPH

An executive agency which has a highly sensitive intelligence or counterintelligence mission directly affecting the national security (e.g., a mission approaching the sensitivity of that of the Central Intelligence Agency) may use the polygraph for employment screening and personnel investigations of applicants for and appointees to competitive service positions only after complying with the procedures in D–2 below.

D–2. DETERMINING WHETHER AGENCY MISSION MEETS CRITERIA

The executive agency must submit to the Chairman of the Civil Service Commission a statement of the nature of its mission. The Chairman shall then determine whether the agency has an intelligence or counterintelligence mission directly affecting the national security.

D–3. REVIEW OF AGENCY REGULATIONS AND DIRECTIVES

a. The agency shall prepare regulations and directives governing use of the polygraph in employment screening and personnel investigations which must be reviewed by the Chairman of the Civil Service Commission. These shall contain as a minimum:

(1) Specific purposes for which the polygraph may be used, and details concerning the types of positions or organizational entities in which it will be used, and the officials authorized to approve these examinations.

(2) A directive that a person to be examined must be informed as far in advance as possible of the intent to use the polygraph and of—

(a) Other devices or aids to the interrogation which may be used simultaneously with the polygraph, such as voice recordings.

(b) His privilege against self-incrimination and his right to consult with legal counsel or to secure other professional assistance prior to the examination.

(c) The effect of the polygraph examination, or his refusal to take this examination, on his eligibility for employment. He shall be informed that refusal to consent to a polygraph examination will not be made a part of his personnel file.

(d) The characteristics and nature of the polygraph machine and examination, including an explanation of the physical operation of the machine, the procedures to be followed during the examination, and the disposition of information developed.

(e) The general areas of all questions to be asked during an examination.

(3) A directive that no polygraph examination will be given unless the person to be examined has voluntarily consented in writing to be examined after having been informed of the above, (a) through (e).

(4) A directive that questions to be asked during a polygraph examination must have specific relevance to the subject of the particular inquiry.

(5) Adequate standards for the selection and training of examiners, keeping in mind the Government's objective of insuring protection

for the subject of an examination and the accuracy of polygraph results.

(6) A provision for adequate monitoring of polygraph operations by a high-level official to prevent abuses or unwarranted invasions of privacy.

(7) A provision for adequate safeguarding of files, charts, and other relevant data developed through polygraph examinations to avoid unwarranted invasions of privacy.

D–4. RESTRICTION ON APPROVAL TO USE THE POLYGRAPH

Approval to use the polygraph will be granted only for 1-year periods. An agency given approval to use the polygraph for competitive service positions will be required to recertify annually that the conditions which led to the original certification still exist in the agency.